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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 52

ARCH R. EVERSON,
Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* ON PETITION FOR REHEARING

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

KENNETH W. GREENAWALT,
WHITNEY N. SEYMOUR,
Of the New York Bar,
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The American Civil Liberties Union, for reasons stated therein, filed a brief *amicus curiae* upon the merits.

The issues in this case are so grave, the doubts raised by the opinion of the Court are pregnant with such conflicts, that we respectfully urge reargument and reconsideration. The opinion indicates that the action of New Jersey which it sustained "approaches the verge" of Constitutional power but where the brink may be, is left

obscure. While it emphasizes the compelling nature of the prohibitions in the First Amendment and declares the Court's determination to avoid "the slightest breach" in the wall separating church and state, what will now be considered a breach is left in doubt. The legislation under review is apparently regarded as close to a breach but is held not to be one. In sustaining the legislation as for the "public welfare," no limitations upon the use of that justification for what would otherwise transcend Constitutional power, are clearly prescribed.

In view of the past controversies reflected in state court decisions, the existence of related legislation in various states, the support mustered on behalf of such legislation in this Court and comments in the press following the decision, it may safely be predicted that there will now occur an intensive drive in many communities to pass new legislation on the authority of the Court's opinion and to extend existing legislation to the utmost limits, which it may be argued the opinion sanctions.

There is no reason to doubt that, encouraged by the use of broad reference to "public welfare" legislation, these efforts will go far beyond bus transportation and will include, among other things, attempts to provide, at public expense, such other essential facilities as books, lunches, salaries, school buildings, etc. The opinion certainly does not contain clear warnings as to the limits of the "public welfare" justification. While there are a myriad of questions which need consideration, two groups of questions may be mentioned as of special importance:

(1) Upon the record before the Court it is clear that the legislation, as interpreted by the local action, which the Court upholds, provided for reimbursement to parents

of children attending only public schools and certain schools maintained by the Catholic church. If such selective legislation is now to be regarded as "public welfare" legislation, it would be desirable for the Court to delineate the precise nature of permissible discrimination.

(2) Clarification of the concept in its context is needed also to enable local authorities to distinguish between action which will be regarded as valid "public welfare" legislation and that which will be regarded as invalid support to religious institutions. For example, may or must local authorities now provide at public expense facilities in denominational schools equivalent to those provided in public schools, such as free supplies, meals, tuitions, etc.? Must the public maintain private and secular school houses and standards of instruction equivalent to those in public schools? If all of the approximately 250 sects in the United States should now choose to maintain denominational schools, would the Court's decision apply equally to them? The questions which readily occur are numerous and fundamental.

The efforts which experience shows will undoubtedly follow the Court's decision will not only involve, as we believe, further serious breaches in the wall erected by the Constitution, but also the sort of unseemly contest among religious sects for public support which the First Amendment was intended to prevent by forbidding all the support. (See Madison's Memorial and Remonstance, Par. 11.) Thus a construction of the First Amendment exempting "public welfare" legislation may be readily turned into an instrument disruptive of the "domestic tranquility" and "general welfare" for which the Preamble shows the Constitution itself was established.

The issues here are so grave, the doubts so many, that the matter should not be left merely to future consideration in other cases. The consequences of the storms which may be loosed in local communities by this decision, at least unless it is clarified, may not lend themselves readily to mere subsequent adjudication. The cracks in the wall will be easier to avoid now than when great shoring-up operations may be needed. This Court has frequently recognized, in recent years, the propriety of early reconsideration of great issues involving religious freedom and none of these recent cases involved issues more important than those here.

Respectfully submitted,

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